United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,750

TOM E. ALSTON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Forma Pauperis Appeal from a Judgment of the

United States District Court for the District of Columbia

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QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Did the court below err in overruling appellant's objection to the admissibility of the confessions on the grounds that they were obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure?

2. Did the court below err in overruling appellant's objection to the admissibility of the confessions when appellant was not informed while being questioned by the police and prior to the time he made the confessions that he was entitled to the assistance of counsel?

3. Did the court below err in overruling appellant's objection to the admissibility of the confessions because they were involuntary without considering the totality of the circumstances under which they were made?

4. Did the court below err in denying appellant's motions for judgment of acquittal and for judgment notwithstanding the verdict when evidence introduced by the government to corroborate appellant's confessions described an assailant with different physical characteristics and wearing different clothing from the appellant?

5. Did the court below err in denying appellant's motions for judgment of acquittal and for judgment notwithstanding the verdict when appellant's confessions were the only evidence linking him to

the crime and the confessions, if believed, showed that the appellant acted in self-defense?

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Forma Pauperis Appeal from a Judgment of the

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JURISDICTIONAL STATEMENT

An indictment was filed on March 30, 1964 in the United States District Court for the District of Columbia charging appellant with second degree murder in violation of 22 D. C. Code §2403 [Indictment]. On April 3, 1964, appellant pleaded not guilty [Plea of Defendant]. His trial lasted from May 14 to May 21, 1964, when a jury found him guilty of the lesser included offense of manslaughter. On June 22, 1964 judgment was entered and appellant was sentenced to imprisonment for a term of five (5) to fifteen (15) years. [Judgment].

On June 22, 1964 appellant filed an Affidavit in Support of Application to Proceed Without Prepayment of Costs. On the same date the United States District Court entered an Order authorizing appellant to proceed on appeal without prepayment of costs [Order]. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1291.

STATEMENT OF THE CASE

Appellant, Tom Ellis Alston, Jr., was charged in a one-count indictment with second degree murder (22 D. C. Code 2403) of one William Thomas Scott [Indictment].

Events Prior to Arrest of Appellant

On February 21, 1964, at about 10:25 p.m., two detectives from the Metropolitan Police Homicide Squad went to a location in front of 1036 and 1038 Sixth Street, N. E., and there observed a large group of civilians and several police officers standing near the body of a man later identified as William Thomas Scott, who was apparently dead from a wound in his neck [Tr. 51].

Defendant's brother, George Alston, was then present at the above location and was shortly thereafter taken to the Homicide Squad office, where he arrived about 10:45 p.m. [Tr. 115]. Thereafter he was questioned by police officers [Tr. 82, 115]. George Alston first informed his questioners that he did not know who had killed

decedent. After over four hours of questioning [Tr. 81, 83], however, George Alston finally implicated his brother, Tom, the appellant [Tr. 135]. Only then did George Alston return home, where he met appellant and told him that he had been questioned and beaten by the police and that he had named appellant as the person who had killed Scott [Tr. 119, 133, 135].

Appellant's Arrest and Event Surrounding His Confession

Appellant was arrested at approximately 5:15 a.m. on February 22, 1964 at the home of his brother, George Alston [Tr. 71]. The arresting officer, before arresting appellant, asked him if he knew where Tom Alston was, and he replied "I am Tom Alston." [Tr. 100, 136]. Appellant was then taken to the Homicide Squad offices. He was not then advised of his right to remain silent, that statements he made would be used against him, or of his right to obtain counsel. He was only informed that the charge against him was homicide [Tr. 215]. Appellant's wife accompanied him but they were separated at the Homicide Squad offices upon arrival. So far as the record shows, appellant was not immediately booked. Instead, he was "talked to briefly, asking his knowledge of the homicide the evening before...." [Tr. 75]. During this "talk," three to five officers were present [Tr. 74, 67], and appellant denied any involvement in decedent's death [Tr. 75, 87]. He testified at a hearing out of the presence of the jury that, after denying his involvement, one

officer told him "We will get it out of you the hard way then." [Tr. 138]. This testimony was contradicted by the testimony of police officers, and the court below believed the police officers [Tr. 170]. In any event, the record shows that, after being questioned by several police officers, appellant was permitted to talk to his wife [Tr. 76]. After talking to her, he made an oral confession [Tr. 77]. It appears from the transcript that only then, after his oral confession, was he advised that he did not have to make any statement and that any statement made by him would be used against him [Tr. 75-78, 175]. He was never at any time prior to arraignment advised of his right to counsel, nor was he asked whether he desired the assistance of an attorney [Tr. 92, 139].

Following the oral confession, the appellant's statement was prepared in question and answer form. According to the police officers, this was begun at 5:55 a.m. and completed at 6:32 a.m. [Tr. 77].

A line up sheet was then prepared [Tr. 153]. The transcript does not indicate what happened subsequently, but the Complaint filed in the Court of General Sessions in this case indicates that appellant

was arraigned at 10:03 a.m.[1/] Appellant remained under detention until April 4, 1964, when he was released on bail on his own recognizance.

The Trial

Appellant's trial began on May 14, 1964 before Judge Alexander Holtzoff [Tr. 1],and was completed on May 21, 1964 [Tr. 237]. The government's evidence, except for the confession, is briefly summarized, as follows:

1. Testimony of Mrs. Jean Harrison - Mrs. Harrison testified that she had known appellant for three years and that he, his brother George Alston and William Scott had been at her home twice on the evening of Scott's death [Tr. 16-21]. She further testified on cross-examination that appellant was wearing a grey overcoat, a brown-streaked shirt with blue polka dots, blue work pants and green boots. She had never seen him wear a hat [Tr. 24].

2. Testimony of Martha Price - Miss Price gave an eye-witness account of the death of William Scott. She observed the altercation between Scott and his slayer from a window one yard

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1/ No testimony or documents in the record on appeal in this case establish the time of appellant's arraignment. The United States Attorney's Office has agreed to stipulate that the Complaint filed in the District of Columbia Court of General Sessions, Criminal Division in Case No. U. S. 1635-64, showing that appellant was advised of his rights about making a statement and his right to counsel, is stamped at 10:03 a.m. on February 22, 1964.

from the place where it occurred [Tr. 30]. She could not see whether Scott had anything in his hand [Tr. 31]. At a bench conference, government counsel conceded that Miss Price could not identify appellant as a participant in the fight [Tr. 33]. On cross-examination, however, she testified that the person who struck Scott had been wearing a green soldier coat [Tr. 35] and a black and white checkered hat with the brim turned up in the rear [Tr. 41-42, 45-46]. She also testified that the person who struck Scott was short and slim [Tr. 36] and indicated that he could have been five feet five inches tall [Tr. 37]. When shown the appellant's coat and asked whether she had ever seen it before, she answered, "No sir" [Tr. 42]. Subsequently, she stated that she did not know whether appellant's coat looked like the coat worn by the man who struck Scott [Tr. 49].

3. Testimony of Linwood L. Rayford, Deputy Coroner for the District of Columbia - After the introduction of a stipulation regarding the death and identification of William Scott, Dr. Rayford testified that Scott had died from hemorrhage and shock resulting from a stab wound in the neck [Tr. 59]. Dr. Rayford also testified that Scott was five feet nine inches tall and weighed 175 pounds [Tr. 59]. When asked to compare appellant's height and weight with Scott's, he stated unequivocally that appellant would be taller than five feet nine inches and that it would appear that he weighed more than Scott [Tr. 63].

4. Testimony of Detective Robert M. Boyd - Detective Boyd was one of the police officers called to the place where Scott's body was found. He testified with regard to the location and appearance of the body [Tr. 51] and with regard to a search of Scott's body for identification. He then testified to having seen appellant in the office of the Homicide Squad on the morning of February 22, 1964. When he attempted to testify about an oral and a written statement made at the Homicide Squad office by appellant, a hearing was held at appellant's request out of the presence of the jury to determine whether the statements were admissible in evidence. This hearing will be discussed shortly. At its conclusion, the Trial Judge ruled that the statements were admissible, and they were introduced into evidence. Detective Boyd further identified the knife that had been in possession of appellant at the time he was arrested [Tr. 201]. On cross-examination, however, Detective Boyd stated that a report had indicated that there were no blood particles on the knife [Tr. 204].

5. Testimony of Detective Joseph M. O'Bryan - Detective O'Bryan testified with regard to the circumstances of appellants arrest and confessions.

When the government attempted to introduce testimony concerning statements made by the appellant, counsel for the appellant objected to the admission of the statements on the ground that the statements were involuntary and on the further ground that Rule 5 of

the Federal Rules of Criminal Procedure had been violated. A hearing out of the presence of the jury was requested [Tr. 70].

At the hearing on the admissibility of the confession, George Alston, appellant's brother, testified that after his arrival at the Homicide Squad office he was separated from other witnesses and interrogated [Tr.116]. Detective Boyd testified that George Alston left the Homicide Squad office at about 3:00 a.m., [Tr. 82] while George Alston testified that he left at 4:55 a.m. [Tr. 116]. George Alston testified that he was hit over the head with a telephone book, pulled out of a chair, stomped, kicked and beaten [Tr. 117]. Another witness who had been outside the room in which George Alston was being interrogated testified to hearing a brief scuffle behind the closed door at the Homicide Squad office [Tr. 166]. The police denied the mistreatment [Tr. 158]. The Court below believed the testimony of the police officers about the circumstances of George Alston's interrogation [Tr. 170]. However, George Alston's wife observed a swollen knee after he returned home, and both she and appellant noted that he limped after the interrogation [Tr. 129, 135 - 136].

The other salient facts with regard to the circumstances under which this confession was obtained have already been summarized in the section of this Statement of the Case entitled "Appellant's Arrest and Events Surrounding his Confession." While this testimony was being developed, the Court below rejected entirely or made

disparaging comments about various matters that counsel for appellant was seeking to introduce in support of his showing that the confession was not voluntary. With regard to testimony eliciting the fact that appellant had only attended school through the eighth grade, the Trial Judge said, "There used to be some eighth grade students who had more common sense than a college graduate." [Tr. 93]. When appellant's counsel attempted to show that appellant had lived most of his life in a rural area, he said "Whether he comes from North Carolina or whether he was born in the District of Columbia has nothing to do with voluntariness." [Tr. 94]. When appellant's counsel attempted to introduce information about appellant's prior criminal record in order to show that he was unsophisticated about arrest and involvement in criminal activity, he said, "I am going to exclude that. That has nothing to do with this case." [Tr. 97]. In ruling on the alleged police brutality directed toward George Alston, he stated, ".... in any event even if his testimony were true, that is not sufficient to render the defendant's statement involuntary." [Tr. 171]. In ruling upon appellants objection to the admission of the confession, the only matters he specifically dealt with were whether the police had made threatening statements to appellant [Tr. 169-171], and whether the police had abused George Alston. So far as the record shows, he did not consider the fact that the appellant was arrested at 5:15 a.m. and not arraigned until 10:03 a.m., the fact that appellant

was not advised of his right to remain silent or of the fact that a statement could be used against him at trial until after he had given an oral confession, and the fact that even after appellant was advised of his right to remain silent and that any statement could be used against him, he was not advised of his right to the assistance of an attorney until after he had signed a written confession. At the conclusion of the hearing, appellant's objection to the admissibility of appellant's statements because they were involuntary was denied. The Trial Judge also ruled that there had been no violation of Rule 5 of the Federal Rules of Criminal Procedure since the statement was a threshhold statement and in any event there was no unnecessary delay before the appellant was brought before a Commissioner [Tr. 172].

The appellant's statement was admitted into evidence. It provided in substance that appellant had known Scott since 1961, that after leaving 619 L Street, N. E., Scott and appellant had quarreled over money, that Scott had hit appellant with some instrument, that Scott swung at appellant's head, that appellant "ducked" and "cut" Scott [Tr. 180], and that appellant's knife had been used to cut Scott.

At the close of the government's case, counsel for appellant moved for judgment of acquittal [Tr. 217]. This motion was denied [Tr. 219]. Counsel for appellant then rested without introducing any evidence [Tr. 219]. The Judge charged the jury with respect to the elements of second degree murder and manslaughter. He also

charged with respect to self-defense [Tr. 224-235].

On May 21, 1964 the jury returned a verdict of guilty of manslaughter [Tr. 237]. Counsel for appellant moved for judgment notwithstanding the verdict [Tr. 239], which was denied [Tr. 242]. Thereafter, on June 22, 1964, judgment was entered and appellant was sentenced to imprisonment for a term of five (5) to fifteen (15) years.

CONSTITUTIONAL PROVISIONS, STATUTUES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law ...."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

Title 22 of the District of Columbia Code, Section 2403, provides as follows:

> "Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another is guilty of murder in the second degree."

Rule 5(a) of the Federal Rules of Criminal Procedure provides as follows:

> "Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without

> unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

STATEMENT OF POINTS

Appellant intends to reply upon the following points in this appeal:

1. It was reversible error for the court below to deny appellant's objection to the admission of the confessions on the grounds that they were obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure because appellant, when arrested, had been identified as the person who had committed the crime and had admitted his identity to the arresting officers and he was not thereupon immediately booked and taken before a magistrate but was questioned and was not arraigned until approximately four and one-half hours after his arrest.

2. It was reversible error for the court below to have admitted appellant's confessions into evidence when appellant, once questioning by the police began, was not advised prior to confessing of his right to counsel.

3. It was reversible error for the court below to overrule appellant's objection to the admission of the confessions on the grounds that they were involuntary because its ruling did not consider the totality of circumstances leading to the confessions.

4. It was reversible error for the court below to deny appellant's motions for judgment of acquittal and for judgment notwithstanding the verdict because the government witnesses, in establishing the corpus delicti in order to corroborate the confession, described an assailant with different physical characteristics and wearing different clothing from the appellant.

5. It was reversible error for the court below to deny appellant's motions for judgment of acquittal and for judgment notwithstanding the verdict because appellant's confessions were the only evidence linking him to the crime and, if believed, they showed that appellant acted in self-defense.

SUMMARY OF ARGUMENT

I.

Appellant's objection to the admission of the confessions on the ground that they were obtained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure should have been sustained. Appellant's brother, under police questioning, had named appellant as the person who had committed the crime. When appellant was arrested, he admitted his identity to the arresting officers. Upon arrival at the Homicide Squad offices, however, appellant was not immediately booked and taken before a magistrate. Instead, he was questioned by police officers. No purpose for such questioning appears in the record other than to obtain a confession. It is the purpose of Rule 5(a) to

require that, prior to such questioning, an arrested person receive impartial advice about his rights. Ricks v. United States, No. 17771 (June 9, 1964) (slip opinion); Spriggs v. United States, No. 17962 (June 19, 1964) (slip opinion); Jones, Short, and Jones v. United States, Nos. 17688-17692 (July 16, 1964) (en banc) (slip opinion); Greenwell v. United States, No. 18193 (August 13, 1964) (slip opinion). Failure to adhere to the requirements of Rule 5(a) -- appellant was not arraigned until approximately four and one-half hours after he arrived at the Homicide Squad office -- required that the court below exclude appellant's confessions. Mallory v. United States, 354 U. S. 449 (1957).

II.

Appellant was not advised of his right to the assistance of counsel prior to either making his oral confession or to signing his written confession. Cases decided under both the Fourteenth Amendment and the Sixth Amendment have recognized that the right to counsel attaches at all critical stages in criminal proceedings. Hamilton v. Alabama, 368 U. S. 52 (1961). Recently, the Supreme Court has held that the critical stage is reached when a police investigation begins to focus on an individual suspect. Escobedo v. Illinois, 378 U. S. 478 (1964). If at that stage the suspect requests that he be allowed to see his lawyer, a refusal to allow him to see his lawyer is a violation of the Sixth Amendment. Constitutional

rights are not, however, dependent on a request that they be accorded. Carnley v. Cochran, 369 U. S. 506 (1962). If an arrested person has a right to have his lawyer present at police questioning, appellant in this case, who testified that he was unaware of his right to have a lawyer present, and who was being questioned by police when he confessed, should have been advised of this right, and failure to so advise him constituted a denial of his right to counsel under the Sixth Amendment. His confessions should therefore have been excluded.

III.

The ruling of the court below that appellant's confessions were voluntary did not consider the totality of circumstances surrounding these confessions and should therefore be reversed. Stein v. New York, 346 U. S. 156 (1953); Spano v. New York, 360 U. S. 315 (1959). The Trial Judge made statements in the course of the hearing on the admissibility of the confession showing that he considered it irrelevant that appellant had only attended school through the eighth grade, that appellant had lived most of his life in a rural area, that appellant had no significant criminal record or experience with police interrogation and that appellant had been told by his brother that he had been beaten by the police and subsequently had implicated appellant in the crime. Furthermore, so far as the record shows, he did not consider in his ruling on voluntariness that appellant was not advised of his right to remain silent and that anything he said could be used

against him prior to making his oral confession nor that he was not advised of his right to counsel prior to making either his written or his oral confessions. Nor does it appear that the Trial Judge considered in his ruling on voluntariness the fact that appellant was not arraigned until approximately four and one-half hours after he arrived at the Homicide Squad offices. This court should therefore reverse the ruling of the court below for applying the wrong standard in determining whether the confession was voluntary.

IV.

A. Appellant's motions for judgment of acquittal and for judgment notwithstanding the verdict should have been granted because there was insufficient corroboration for appellant's confession. Although it is not necessary that all elements of the crime be proven by evidence independent of the confession, thc independent evidence must be sufficient for the jury to infer the trustworthiness of the confession. Opper v. United States, 348 U. S. 84 (1954): Smoot v. United States, 114 U. S. App. D. C. 154, 312 F. 2d 881 (1962). Here, an eye witness to the crime described the slayer as short and slim, while testimony in the record shows that appellant was in excess of five feet nine inches tall and that he appeared to weigh more than 175 pounds. Furthermore, testimony in the record shows that appellant was wearing clothing other than that described by the eye witness. On the basis of such testimony, the jury could not

reasonably have inferred that appellant's confessions were trustworthy, and appellant's motions should therefore have been granted.

B. Appellant's motion for judgment of acquittal and judgment notwithstanding the verdict should have been granted because appellant's confessions, the only evidence linking him to the crime, if believed, show that appellant acted in self-defense. Although it may be permissible for a jury to believe some parts of a confession and not believe others when a defendant has testified and the jury has had an opportunity to assess the credibility of the defendant, there is no basis in this case for the jury to believe parts of the confession and reject other parts. Furthermore, there was no evidence from which the jury could conclude that appellant had acted otherwise than reasonably and in self-defense.

ARGUMENT

I. THE COURT BELOW ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE ADMISSION OF HIS CONFESSIONS BECAUSE THE CONFESSIONS WERE OBTAINED IN VIOLATION OF RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

With respect to Point I, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 69-107 inclusive, 113-172 inclusive, 175.

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrested person be taken "without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws

of the United States." In Mallory v. United States 354 U. S. 449 (1957) the Supreme Court held that confessions obtained in violation of this rule are inadmissible. It further defined the requirements of the Rule, stating (page 453):

> "Provisions related to Rule 5(a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate."

The Court added (page 454):

> "The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

Further, the Court said (page 455):

> "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

In the case at bar, appellant was arrested at the house of his brother at approximately 5:15 a.m. on the morning of February 22, 1964 [Tr. 71], after his brother, under police questioning, had named him as the person who had committed the crime [Tr. 135]. Appellant admitted his identity to the arresting officers [Tr. 100, 136]. He was clearly under arrest and was not being taken in for any other reason [Tr. 71]. The record does not show at what time appellant

was "booked", but the testimony of Detective Boyd indicates that, rather than being booked and taken before a magistrate, he was questioned by officers of the Homicide Squad immediately upon arriving at the Homicide Squad office [Tr. 75]. Although there was conflicting testimony as to what occurred next, even if the testimony of the police officers is accepted, it appears that appellant, after being arrested, arrived at the Homicide office at about 5:30 a.m. He was first questioned for approximately five minutes. He then talked to his wife, who had accompanied him to the Homicide Squad office, and at approximately 5:45 a.m. he made an oral confession [Tr. 75-77]. It appears from the testimony of Detective Boyd that only <u>after</u> making such oral confession, was he advised of his right to remain silent and that any statement he made could be used against him [Tr. 75-78, 175]. He was not advised, either before or after the oral confession, that he had a right to have a lawyer present during police interrogation [Tr. 91-92]. A written statement in question and answer form was begun at approximately 5:55 a.m., and completed at approximately 6:32 a.m. [Tr. 77]. After he had signed the confession, he was taken for processing through the Identification Bureau [Tr. 154]. He was not formally arraigned until 10:03 a.m. on the morning of the day he was arrested, almost five hours after he was arrested.

The court below ruled that appellant's confession was a "threshold confession" and admissible under United States v. Mitchell, 322 U. S. 65 (1944). It based this ruling upon the amount of time between the appellant's arrest and the time of his confession. This ruling is in conflict with the Mallory case and with rulings of this Court interpreting the Mallory rule. If Detective Boyd's testimony is believed, appellant was not subjected to prolonged questioning prior to his confession. Nevertheless, in Jones, Short and Jones v. United States, Nos. 17688-17692 (July 16, 1964) (en banc) (slip opinion), this Court, in considering the problems involved in applying the Mallory rule stated (slip opinion page 5):

> "Some delay for the purpose of questioning an arrested person to determine whether he should be held or released has sometimes been thought 'necessary.' But this assumes some appropriate purpose for the delay other than obtaining a confession, as in Metoyer v. United States, 102 U. S. App. D. C. 62, 250 F. 2d 30 (1957), and Heideman v. United States 104 U. S. App. D. C. 128, 259 F 2d 943 (1958), where 'inquiry to make sure the police were not charging the wrong persons' (Heideman at 130) seemed appropriate. It has nothing to do with this case."

In that case and in this Court's decisions in Ricks v. United States, No. 17771 (June 9, 1964) (slip opinion), Spriggs v. United States, No. 17962 (June 19, 1964) (slip opinion) and Greenwell v. United States, No. 18193 (August 13, 1964) (slip opinion) the confessions were excluded because the record showed that irrespective of the amount

of time that was involved in the questioning before arraignment, in each case the questioning qua questioning was improper because it had no purpose other than the obtaining of a confession.

Appellant is aware that the decisions of this Court in Muschette v. United States, 116 U. S. App. D. C. 239, 322 F. 2d 989 (1963), vacated mem. on other grounds, 378 U. S. 569 (1964), and similar cases[2/] may appear to point to a different conclusion. We submit that those cases, properly read, are in accord with the principles urged by appellant. See Jones, Short and Jones v. United States, supra. In Muschette, for example, although the confession was admitted, the defendant was arraigned within one hour and twenty minutes after he arrived at the police station, unlike the four and one-half hours involved in the present case. Secondly, although there may have been probable cause for arrest in that case, the probable cause resulted from inferences that the police drew from a number of facts. In questioning the defendant in that case, the police may have simply been giving the defendant an opportunity to demonstrate that the inferences drawn had been

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2/ E. g., Metoyer v. United States, 102 U. S. App. D. C. 62, 250 F. 2d 30 (1957); Heideman v. United States, 104 U. S. App. D. C. 128, 259 F. 2d 943 (1958). cert denied 359 U. S. 959 (1959).

incorrect. In any event, the Court in Muschette recognized that the question to be resolved was the factual one of the necessity of the delay in arraignment. It said (116 App. D. C. at page 241, 322 F. 2d at page 991):

> "The problem is not to be solved by watching the clock; the solution is to be reached by determining whether the delay which occurred was in fact unnecessary when the sum total of the circumstances shown is considered."

In the instant case, appellant had been named by his brother as the person who had committed the crime and had admitted his identity to the arresting officers. Whatever necessity may have existed for questioning the defendant in Muschette before his arraignment, in the instant case there was no conceivable necessity for questioning appellant -- that is, no necessity other than the obtaining of a confession, an inappropriate purpose under both Mallory and Muschette, as well as under this Court's more recent decisions in Ricks v. United States, supra, Spriggs v. United States, supra, Jones, Short and Jones v. United States, supra, and Greenwell v. United States, supra. It was therefore reversible error for the court below to admit the confessions.

II. THE COURT BELOW ERRED IN NOT RULING THAT APPELLANT WAS DENIED RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT WHEN A CONFESSION WAS TAKEN FROM HIM DURING QUESTIONING BY THE POLICE AFTER HE HAD BEEN ARRESTED WITHOUT FIRST WARNING HIM THAT HE NEED NOT MAKE ANY STATEMENT WITHOUT THE ASSISTANCE OF COUNSEL.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 3, 69-92 inclusive, 133-140 inclusive.

According to the testimony of Detective Boyd, appellant was advised of certain rights immediately after making his oral confession [Tr. 75-78, 175]. The nature of the advice given appellant by the police officers was clarified in the following colloquy between appellant's counsel and Detective Boyd [Tr. 91-92]:

"Q... With respect to the rights that you advised the defendant of, you told us that you advised him of the possibility of the statement that was made by him being used against him, is that correct?

A: Yes.

Q: Did you advise him he had a right to retain an attorney?

A: I don't remember advising about an attorney, no.

Q: Do you remember anyone in the office advising him about his right of retaining an attorney?

A: I don't remember anyone advising him, no.

Q: Do you remember whether he requested an attorney to be present?

A: No, he didn't.

Q: Do you recall whether or not any one of the officers in your presence asked him if he wanted them to call an attorney for him?

A: I don't recall that being mentioned by anyone, no."

Subsequently, during the appellant's testimony with regard to the confession, in response to a question from his counsel asking whether he knew he was entitled to a lawyer while undergoing questioning, he responded "No sir." [Tr. 139] At that time, the Trial Judge made the following comment [Tr. 140].

> "No, there is a serious question as to whether a person is entitled to a lawyer before he is taken to court.
>
> "The Supreme Court held many years ago in the Wilson case that a warning is not required, and that has never been overruled. Apparently a great many people have forgotten about that decision of the Supreme Court."

The Trial Judge was apparently referring to Wilson v. United States, 162 U. S. 613 (1896). This statement of the Trial Judge, although made within the context of a hearing on the voluntariness of the confession, is contrary to the present law on right to counsel. Having so stated his views prior to the termination of the hearing on the admissibility of the appellant's statement, specific objection based upon the failure of the police to warn appellant that he had a right to counsel would have been fruitless. In any event, the matter was effectively called to the Trial Judge's attention. See Perry v. United States, No. 17846 (July 31, 1964) (slip opinion).

From at least the time of the Supreme Court decision in Powell v. Alabama, 287 U. S. 45 (1932), the Supreme Court has recognized the importance of counsel in determining whether an

accused has been accorded due process of law,[3/] and it has similarly recognized that for the assistance of counsel to be meaningful, it must be accorded for at least some period prior to trial. Powell v. Alabama, supra, involved the right to counsel during preparations for trial, but in its decision in Hamilton v. Alabama, 368 U. S. 52 (1961), the Supreme Court made it clear that a defendant had a right to counsel at times prior to the preparation for trial. In that case, after examining the nature of an arraignment under Alabama law and determining that important rights could be lost by not making certain pleas and motions at an arraignment, the Court stated that arraignment was "a critical stage" in Alabama's criminal proceedings and that a denial of counsel at the time of arraignment was a denial of due process of law. Recognition was given to the fact that due process requires counsel at any judicial stage in criminal proceedings when substantial rights could be lost. Subsequently, in White v. Maryland, 373 U. S. 59 (1963), the Supreme Court held that a preliminary hearing prior to arraignment in Maryland was also a "critical"

3/ Prior to the Supreme Court's decision in Gideon v. Wainwright, 372 U. S. 335 (1963), cases arising in state courts and involving questions of the right to counsel were decided under the due process clause of the Fourteenth Amendment. In the Gideon case, however, the Supreme Court held that the Sixth Amendment to the Constitution applied to the states through the Fourteenth Amendment. As a result, while prior cases involving the right to counsel are a fortiori applicable in cases decided in Sixth Amendment terms in both state and federal courts, the subsequent cases decided by the Supreme Court concentrate specifically upon the meaning of the Sixth Amendment's guarantee to right to counsel.

stage and reversed a conviction obtained by introducing a guilty plea made without counsel at a preliminary hearing.

In Massiah v. United States, 377 U. S. 201 (1964), the Supreme Court for the first time recognized the right of a defendant to counsel during questioning in which law enforcement officers were participating. In that case, a defendant after indictment and the formal entry of a plea of not guilty, was released on bail. While he was on bail a co-defendant decided to cooperate with Federal officers and engaged the defendant in a conversation in his car. Unknown to the defendant a radio transmitter was under the seat of the car, and a federal agent listened to the conversation and testified at the defendant's trial about it. The Court said (at page 206):

> "We hold that the petitioner was denied the basic protections of that guarantee [Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

In addition, the Court, citing with approval a concurring opinion in Spano v. New York, 360 U. S. 315 (1959), said (at page 204):

> "It was said that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extra-judicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' [Citing Mr. Justice Douglas' concurring opinion in the Spano case]."

Previously, right to counsel cases in the Supreme Court had only dealt with situations where a defendant was before a judicial authority or where he was preparing for trial. The Massiah case therefore represents a major development in the law on the right to counsel.

On the last day of its last term, the Supreme Court, in Escobedo v. Illinois, 378 U. S. 478 (1964), held that even prior to indictment, a confession obtained after denying the arrested person the right to consult with his counsel was obtained in violation of the Sixth Amendment to the Constitution, as made obligatory upon the states by the Fourteenth Amendment.[4/] In that case, a defendant sought repeatedly during the course of interrogation by the police to speak to his lawyer. The police denied his requests. The defendant's lawyer was also at the police station trying to see his client, but the police refused to let him do so. Subsequently, Escobedo confessed, prior to any judicial proceedings. Although it was argued that the Escobedo case differed essentially from the Massiah case in that the defendant had not been formally indicted, the Court stated,

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4/ At least two other courts had anticipated this holding. See United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957); United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957); People v. Donovan 13 N. Y. 2d 148, 193 N. E. 2d 628 (1963).

". . . in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime' [citing concurring opinion of Mr. Justice Stewart in Spano v. New York, supra]." 378 U. S. at page 485. The Court further stated (at page 486):

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder."

In the concluding paragraphs of its opinion, the Court succinctly stated the time at which the right to counsel attaches. It said (at page 492):

> "We hold only that when the process shifts from investigatory to accusatory -- when its focus is on the accused and its purpose is to elicit a confession -- our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

It must be conceded that none of the cases cited thus far explicitly reach the case of a confession given by a person under arrest who does not specifically ask for a lawyer. However, when the line of cases discussed above, culminating in Escobedo v. Illinois, supra, is put together with other existing cases in the Supreme Court and in this Court, such a result is required. This Court has itself recognized that an individual's status undergoes a significant change at the time he is arrested. In Killough v. United States, 114 U. S.

App. D. C. 305, 315 F. 2d 241 (1962) (en banc) this Court said (114 U. S. App. D. C. at page 311, 315 F. 2d at page 247):

> "The problem presented by this case cannot be understood in terms of the efficiency of permitting an arrested person to be interrogated at length before he has a preliminary hearing. It must be considered in terms of the change in the status and relationship of the parties that takes place when an arrest is made. Once a person is arrested he becomes clothed with the right to have the basis for his arrest inquired into by a magistrate. This fundamental change in status is the basis for the rule that a confession obtained by official failure to recognize and abide by the change is not admissible in evidence."

Although appellant in this case did not ask for counsel, "... it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." Carnley v. Cochran, 369 U. S. 506 (1962). See also McNeal v. Culver, 365 U. S. 109 (1961). As already indicated, appellant herein testified that he did not know that he had a right to counsel, and based upon facts appearing in the record, e.g., the fact that he had only attended school through the eighth grade [Tr. 134], the fact that he lived most of his life in Whitakers, North Carolina, a rural southern town [Tr. 134], and defendant's minimal prior criminal record [Tr. 3], this statement has credibility.

This Court has also recognized the importance of counsel to a person under arrest. In Spriggs v. United States, supra, this Court, in discussing the importance of bringing a person under arrest promptly before a magistrate, said (slip opinion, page 5):

> "It is of little consequence that the officer says he advised Spriggs he need make no statement and if did it would be used against him. Under the law Spriggs was entitled to be taken to a magistrate for public advice by the magistrate as to his rights, including his right to counsel with an opportunity to obtain counsel."

And in Greenwell v. United States, supra, it said (slip opinion, page 6-7):

> "Ordinarily, arrest is the culmination, not the beginning of police investigation. Under our adversary system confessions, including those obtained after the accused has been advised of his rights by the police, are not the normal proofs upon which convictions are obtained. Secret extra-judicial examination to produce damning evidence cannot be allowed to render useless or unavailing the right to 'a trial "in an orderly courtroom presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." ' Massiah v. United States, supra, slip opinion, page 4. To admit such evidence 'would make the trial no more than an appeal from the interrogation; and the "right to use such counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination." ' Escobedo v. United States, supra, slip opinion page 9."

As Professor Chafee has said, "a person who is accused of a crime needs a lawyer right after his arrest probably more than any other time." 2 Documents on Fundamental Human Rights 541 (1951-1952). Opinions have also been expressed in recent law review articles in support of appellant's position herein. See Note, "The Coming of the Massiah: A Demand for Absolute Right to Counsel,"

52 Georgetown Law Journal 825 (Summer 1964); Note, "Right to Counsel During Police Interrogation," 16 Rutgers L. Rev. 573 (1962); Rothblatt and Rothblatt, "The Right to Counsel and to Prompt Arraignment" 27 Brooklyn Law Rev. 24 (1960).

Finally, Mr. Justice White, in his dissenting opinion in the Escobedo case, recognized that the majority opinion in that case would be equally applicable to a situation such as that confronting this Court in this case. He said (378 U. S. at page 495):

> "In Massiah v. United States, 377 U. S. 201, the Court held that as of the date of the indictment the prosecution is disentitled to secure admissions from the accused. The Court now moves that date back to the time when the prosecution begins to 'focus' on the accused. Although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, cf. Gideon v. Wainright, 372 U. S. 335 [and other cases], or has asked to consult with counsel in the course of interrogation. Cf. Carnley v. Cochran, 369 U. S. 506. At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel."

The right to counsel at all stages of a criminal proceeding is an absolute one guaranteed by the Constitution. If this right can be waived, such a waiver to be effective must be meaningfully made. Johnson v. Zerbst, 304 U. S. 458 (1938). Counsel believe that recent decisions of this Court indicate that any confession

obtained as a result of police questioning without the presence of counsel is inadmissible.[5] But the facts in this case do not require this court to go so far, since the record shows that appellant was not advised of his right to counsel by the police or a Commissioner before he confessed,[6] and his confession was not made until after police interrogation had begun.[7] It was therefore error for the court below to admit confessions which were the result of questioning an arrested person unrepresented by counsel and ignorant of his right to have counsel.[8]

5/ Johnson and Stewart v. United States, Nos. 18243-18244 (October 15, 1964) (slip opinion). Compare dissenting opinion of Judge Fahy in Jackson v. United States, No. 17746 (August 13, 1964) (slip opinion, p. 11).

6/ In Jackson v. United States, No. 17746 (August 13, 1964) (slip opinion), where this Court upheld the admission of a confession obtained without the presence of counsel, the appellant had been advised of his rights, including his right to an attorney, by both the FBI agent who arrested him and by a Commissioner before he confessed.

7/ In Long v. United States, No. 18368 (October 22, 1964) (slip opinion), it appears that there was evidence from which the District Court could have found that the appellant volunteered a statement to police officers before they could identify themselves and advise him of his rights.

8/ It should be noted with respect to appellant's Points I and II that the Chief of the Metropolitan Police Department, as a result of an exchange of correspondence with the United States Attorney, has recently ordered the Metropolitan Police to cease questioning suspects once they enter a police station until after they are arraigned and represented by counsel. This action was taken as a result of the cases upon which appellant relies in this appeal. "Directive Limits Police Questioning of Suspects," Washington Post, October 28, 1964, page 1.

III. THE COURT BELOW ERRED IN NOT CONSIDERING THE TOTALITY OF CIRCUMSTANCES SURROUNDING APPELLANT'S CONFESSION IN DETERMINING WHETHER THE CONFESSION WAS INVOLUNTARY.

With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 69-107 inclusive, 113-173 inclusive.

Counsel for the appellant objected to the admission of his confessions on the ground that they were involuntary [Tr. 70]. In overruling this objection, the court below specifically considered as relevant only the question of whether or not a threatening statement was made to the appellant by the police [Tr. 169-171]. Previously, in hearing the evidence on whether to exclude the confession, the court below either rejected entirely or made disparaging comments about various matters that counsel for the appellant was seeking to introduce in support of his showing that the confession was involuntary. For example, when counsel for appellant attempted to show that appellant had only attended school through the eighth grade, the Judge said, "There used to be some eighth grade students who had more common sense than a college graduate." [Tr. 93] When appellant's counsel was attempting to show that the appellant came from a rural area, the Judge stated, "Do you mean to infer that the District of Columbia people are superior in intelligence to those in North Carolina?" [Tr. 94] Shortly thereafter he added, "I have to decide whether this confession was voluntary. Whether he comes from North

Carolina or whether he was born in the District of Columbia has nothing to do with voluntariness." [Tr. 94] When appellant's counsel attempted to introduce information about his prior criminal record, in order to show that defendant was unsophisticated about arrest and involvement in criminal activity, the Judge stated, "I am going to exclude that. That has nothing to do with this case." [Tr. 97] Finally, although the judge believed the testimony of the police officers with regard to the treatment of George Alston, appellant's brother, while he was under questioning, he also stated "... in any event even if his testimony were true, that is not sufficient to render the defendant's statement involuntary." [Tr. 171]

Whether a defendant's confession is coerced depends upon all of the circumstances surrounding the confession. Stein v. New York, 346 U. S. 156 (1953); Haynes v. Washington, 373 U. S. 503 (1963). As the Court said in the Stein case (346 U. S. at page 185):

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

In looking into the circumstances to determine whether a confession is coerced, the Supreme Court has considered relevant a number of factors. Among those factors are a defendant's prior criminal record, Stein v. New York, supra, Fikes v. Alabama, 352 U. S. 191 (1957), which the court below ruled irrelevant in this case and

the defendant's educational background, McNeal v. Culver, 365 U. S. 109 (1961), Fikes v. Alabama, supra, which the court below did not consider. Furthermore, although the Trial Judge indicated that coercion against someone else, in this case appellant's brother, was irrelevant in determining whether the confession was coerced, in Spano v. New York, 360 U. S. 315 (1959) the fact that the defendant was told by another person, an acquaintance of the defendant, that he was in danger of losing his position at the Police Academy, thereby imperiling the security of his pregnant wife and three children, was considered a relevant factor in determining coercion, even though the statement made to the defendant in the Spano case was untrue. And in United States v. La Vallee, 270 F. 2d 513 (2nd Cir. 1959), the Second Circuit considered physical coercion upon a person other than the person making admissions to be a factor indicating that the admissions were coerced. In the case at bar, it was uncontradicted that appellant's brother told him he had been beaten at the Homicide Squad office [Tr. 119, 135].

In addition to the matters discussed above, which the court below clearly indicated it was not considering in making its ruling on voluntariness, there are a number of other relevant factors which the court gave no indication it considered. An attorney was not present while appellant was being questioned and appellant was not advised of his right to have an attorney present.

Independent of the question of whether absence of an attorney during police questioning is alone sufficient to warrant reversal, such absence has been considered a factor in determining coercion. Chambers v. Florida, 309 U. S. 227 (1940); Harris v. South Carolina, 338 U. S. 68 (1949); Fikes v. Alabama, supra. Appellant made an oral confession before he was advised of his right to remain silent and that anything he said could be used against him [Tr. 75-78, 175], and failure to advise a defendant of these rights has similarly been considered a factor in determining coercion. Watts v. Indiana, 338 U. S. 49 (1949); Harris v. South Carolina, supra.

Although there are some factual differences between Spano v. New York, supra, and the instant case, many of the factors considered by the Supreme Court in Spano in determining that the confession in that case was coerced are present in this case. For example, the Court considered it relevant that Spano had no past history of law violation or of subjection to official interrogation. It also considered as relevant the fact that he had completed only one-half year of high school, that his confession was not a narrative statement but in question and answer form, that he was subjected to questioning by several officers and that an acquaintance of the defendant's then attending the Police Academy told the defendant that he would be subjected to economic sanctions if the defendant did not confess. And, the Supreme Court decided that Spano's

confession had been coerced despite the fact that Spano had been accompanied to the police station by an attorney who, before leaving him, warned him not to answer questions.

In failing to consider all of the factors that may have been relevant in determining whether appellant's confession was coerced, the court below committed reversible error, and its limited view of its function in determining whether the confession was coerced may have influenced its decision on the credibility of witnesses. A new hearing, applying the proper standard, is therefore necessary in order to determine whether appellant's confession was voluntary.

IV. THE COURT BELOW ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL OR HIS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

With respect to Point IV appellant desires the Court to read the following pages of the reporter's transcript: 15-73 inclusive, 107-110 inclusive, 173-184 inclusive, 199-224 inclusive, 233-235 inclusive, and 239-242A inclusive.

A. There Was Insufficient Corroboration for Appellant's Confession.

The government's case against the appellant rested upon his confession. There was no other evidence linking him with the death of William Scott. In addition to appellant's confession, the government presented testimony of Mrs. Jean Harrison that appellant, his brother George Alston and William Scott had been together at her home on the evening of Scott's death [Tr. 18, 20]. She also testified, however,

that appellant was wearing a grey overcoat, a brown-streaked shirt with blue polka dots, blue work pants, and green boots and that she had never seen appellant wearing a hat [Tr. 24]. Martha Price, an eye witness to the death of Scott, testified about the fight in which Scott had been killed, but government counsel conceded that she could not identify appellant as a participant in the fight [Tr. 33]. On cross-examination, she testified that the person who had killed Scott had been wearing a green soldier coat [Tr. 35], and she subsequently stated that she did not know whether appellant's coat was the one worn by the assailant [Tr. 49]. She further testified that the assailant was wearing a black and white checkered hat with a brim turned up in the rear [Tr. 41-42, 45-46]. She also testified that the person who struck Scott was short and slim [Tr. 36] and indicated that he could have been five feet five inches tall [Tr. 37]. A stipulation was introduced regarding the fact of Scott's death and his identification. Linwood L. Rayford, Deputy Coroner for the District of Columbia testified that Scott had died from hemorrhage and shock resulting from a stab wound in the neck [Tr. 59]. He further testified that Scott was five feet nine inches tall and weighed 175 pounds [Tr. 59]. When asked to examine the appellant with regard to his height and weight, he stated, "This gentlemen would undoubtedly be taller than five foot nine", [Tr. 63] and with regard to the weight of the appellant, he stated, "... I would say it would appear that he would weigh

more than the deceased...." [Tr. 63] Detective Boyd, in the course of his testimony, which dealt mainly with the circumstances of appellant's arrest and confession, also identified a knife that had been found on appellant at the time he was arrested [Tr. 201]. On cross-examination, however, he stated that a report had indicated that there were no blood particles on the knife [Tr. 204].

Aside from the confession, therefore, the Government's case rested entirely upon proof of the death of Scott, his identification, and the fact that he had been killed in a fight.

Since this Court's decision in Forte v. United States, 68 U. S. App. D. C. 111, 94 F. 2d 236 (1937) aff'd on other grounds 302 U. S. 220 (1937), it has been recognized that an uncorroborated confession alone is insufficient to sustain a conviction in a criminal case. This Court also stated in that case (68 U. S. App. D. C. at page 115, 94 F. 2d at page 240):

> "...such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the corpus deliciti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith."

This was the rule subsequently applied in the District of Columbia until the Supreme Court's decision in Opper v. United States, 348 U. S. 84 (1954). See e. g. George v. United States, 75 U. S. App. D. C. 197, 125 F. 2d 559 (1942) and Ercoli v. United States, 76 U. S. App. D. C. 360, 131 F. 2d 354 (1942). In the Opper case, the Supreme Court discussed both the rule enunciated in the Forte case and a less strict rule. It indicated its preference for the less strict rule, stating:

> "... we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. [Citation omitted] It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission, must, of course, be sufficient to find guilt beyond a reasonable doubt." 348 U. S. at page 93.

Since the Supreme Court's decision in the Opper case, this Court has had occasion to apply the corroboration rule of the Opper case. In some instances, it has resulted in convictions that could not have been sustained under the rule in the Forte case. Compare Forte v. United States, supra with Bray v. United States, 113 U. S. App. D. C. 136, 306 F. 2d 743 (1962). The rule presently being applied by this Court in determining whether there is sufficient corroboration for a

confession was stated in Smoot v. United States, 114 U. S. App. D. C. 154, 312 F. 2d 881 (1962) as follows (114 U. S. App. D. C. at page 158, 312 F. 2d at page 885):

> "We also learn from the Opper case, supra, that an incriminatory statement made by the accused need not be corroborated by independent evidence of the fact admitted, but that independent evidence showing the admission to be trustworthy is sufficient; and that the latter evidence may be different from and less than the former. From this we conclude that a complete confession need not be corroborated by independent evidence of all or any of the elements of the crime, but that it may be sufficiently substantiated by independent evidence of attending facts or circumstances from which the jury may infer the trustworthiness of the confession.".

Applying this legal standard to the facts in the case at bar, this Court must conclude that appellant's confession was not sufficiently corroborated. In the course of proving the corpus delicti the evidence introduced by the Government, as supplemented on cross-examination by appellant's counsel, rebutted whatever corroboration would ordinarly have been shown by proof of the corpus delicti. The description of Scott's assailant by an eye witness to his death differed materially from that of appellant in several respects. First, as testified to by Mrs. Harrison, appellant was wearing a grey overcoat, a brown-streaked shirt with blue polka dots, blue work pants and green boots. An eye witness to the slaying, Miss Price, testified, however, that the assailant was wearing a green soldier coat, and she was unable to identify appellant's coat as that worn by the assailant.

The detail with which Miss Price described the hat worn by the assailant -- a black and white checkered hat with the brim turned up at the rear -- and Miss Harrison's testimony that she had never seen appellant wearing a hat although she had known him for about three years [Tr. 24], raises additional doubts. Further, Miss Price described the assailant as short and slim, while Dr. Rayford testified that appellant was in excess of five feet nine inches tall and appeared to weigh more than 175 pounds. Appellant's knife, which purported to be the instrument that killed Scott, was introduced, but there was no testimony that linked this knife to the death of Scott.

The independent circumstances presented by the government to corroborate the appellant's confession, therefore, only succeeded in questioning its trustworthiness, and the Court below should have granted the appellant's motion for judgment of acquittal or for judgment notwithstanding the verdict.

B. In Order to Convict Appellant, It Was Necessary That the Jury Believe the Confession, and the Confession Established that Appellant Acted in Self-Defense.

Appellant's written confession reads in part as follows [Tr. 179-180]:

> "Well, we left 619 L Street, Northeast, George, my brother, and Chop-Chop. That is William Scott. And Chop-Chop said I owed him a dollar, and I told him I don't know that I owe you a dollar, I don't owe you a dollar. And we started arguing, me and him. We

> got in an argument and Chop-Chop hit me with his fist on my right chest and then he hit me with a stick, a board or something, and he hit me on the back of my right shoulder with that, and he hit my brother on the knee with the board. Then Chop-Chop swung at my head with that board or stick or whatever it was and I ducked and I cut him."

Although Martha Price, an eye witness to the slaying testified that she did not see Scott hit his assailant [Tr. 33], she also testified that she did not see anything in the hands of the assailant [Tr. 37] and that it was dark in the yard where the fight occurred, that the lights were on inside the apartment in which she was standing and that she couldn't see very well outside [Tr. 38]. Her testimony, therefore, cannot be considered as contrary to the statements in appellant's confession indicating that he acted in self-defense.

After the government had rested its case and appellant's motion for judgment of acquittal had been denied, appellant rested without introducing any evidence [Tr. 219]. The appellant never testified and the jury therefore did not have an opportunity to draw conclusions about his credibility.

Although there may be some cases in which a jury is justified in believing portions of a confession and not believing others, in this case the jury had no basis on which to pick and choose what it would believe and what it would not. No evidence contradicted the facts in the confession that made out a claim of self-defense, and since appellant had not testified, the jury could not rely on its estimate of

appellant's credibility to justify disbelieving portions of the confession. Even if a jury is free to believe or disbelieve exculpatory portions of a confession, however, it cannot draw inferences contrary to the exculpatory parts of the confession unless there is some affirmative evidence contradicting them. United States v. Wilson, 178 F. Supp. 881 (1959) (Dist Ct. D. C.). Here there was none.

In commenting upon the evidence before submitting the case to the jury, the Trial Judge recognized the difficulty of convicting appellant on this record. He said [Tr. 234]:

> "If, however, you do not accept his statement as true, you find yourself in somewhat of a difficulty because if you disbelieve and reject his statement you have no evidence in the case to take its place, and you cannot convict a person on a surmise or on a speculation of what the facts probably were."

Nevertheless, after the jury delivered its verdict the Trial Judge denied appellant's motion for judgment notwithstanding the verdict. He felt that the jury's verdict could be sustained either on the ground that it did not believe the exculpatory portions of the confession or that it believed the appellant, though acting in self-defense, used excessive force [Tr. 242]. With respect to the first ground, as already discussed, there was no testimony on the basis of which the jury could infer that appellant had not acted in self-defense. With respect to the second ground, the Trial Judge stated [Tr. 241-242]:

> "His statement is to the effect that the victim hit him with something, it was either a board or a stick -- well, a stick, of course, might be a very minor instrument -- and also that he hit him with his fist.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Brief for Appellant was mailed to David C. Acheson, Esquire, United States Attorney for the District of Columbia, United States Court House, Washington, D. C. on this 2nd day of November, 1964.

George H. Shapiro

George H. Shapiro

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18750

TOM E. ALSTON, Jr., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM C. WEITZEL, Jr.,
JOHN R. KRAMER,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee the following questions are presented on appeal:

(1) Was a confession made by appellant shortly after his arrest and arrival at the precinct, which was immediately reduced to writing, secured in violation of the *Mallory* rule?

(2) Did the trial court apply an incorrect constitutional standard in finding appellant's confessions voluntary?

(3) Should a voluntary confession be excluded because given at a time when appellant who had been warned of his constitutional rights regarding the making of a statement was not warned of his right to secure counsel?

(4) Was there sufficient corroboration of appellant's confession to sustain the verdict where independent evidence tended to establish the corpus delicti?

(5) Was appellant's confession viewed in conjunction with the other evidence adduced at trial sufficient to support his conviction of manslaughter?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18750

TOM E. ALSTON, Jr., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed on March 30, 1964, appellant was charged with second degree murder in violation of 22 D.C.C. § 2403. After trial by jury lasting from May 14 to May 21, 1964 he was convicted of the lesser included offense of manslaughter. By judgment and commitment entered on June 22, 1964, appellant was sentenced to imprisonment for a term of five to fifteen years. The District Court granted appellant's petition to appeal in forma pauperis.

At trial Mrs. Jean Harrison of 619 L Street, Northeast, testified that appellant in the company of his brother George Alston and a third man called "Chop" who subsequently proved to be the deceased, William T. Scott, came to her house twice on the evening of February 21, 1964 (Tr. 18–21). She heard no arguments between appellant and deceased (Tr. 24).

Miss Martha Price, who was at her aunt's house at 1036 6th Street, Northeast, on the 21st, described a fight that she had observed from a lighted window on the first floor. A man with his back to her hit a man facing her two times, once in the

stomach and once up around the neck (Tr. 30–31). The man who was hit had nothing in his hands and did nothing to his assailant (Tr. 31). He walked to the next house and fell (Tr. 32). Appellant stipulated that the homicide took place in front of 1036—6th Street, Northeast (Tr. 56), thereby clarifying Miss Price's position as an eyewitness to the murder, which was further solidified by appellant's confession (Tr. 181).

Deputy Coroner Lynwood L. Rayford testified that William T. Scott died from hemorrhage and shock induced by a stab wound in his neck which severed his jugular vein and carotid artery (Tr. 59).

When Detective Boyd, who had recounted his arrival at the scene of the homicide and indicated his observations there (Tr. 51), attempted to relate oral statements made by appellant, a hearing out of the presence of the jury was held at appellant's request on the admissibility of these and other statements (Tr. 73–172).

The Hearing on the Admissibility of the Confessions

According to Detective Boyd, appellant was arrested at 5:15 A.M. on the morning of February 22, 1964 at the home of his brother, George Alston, at 18 Eye Street, Northwest (Tr. 71). He and his wife were transported to the offices of the Homicide Squad at Police Headquarters, arriving there at 5:30 A.M. (Tr. 68, 74, 75). Appellant was placed at one end of an L-shaped room with his wife around the corner, separated from him by an open door (Tr. 85, 106). The police talked to appellant "very briefly," for five minutes "at most," about what he knew of the homicide (Tr. 75, 87). Appellant said he knew nothing about it (Tr. 75). At that point, the police were asked by appellant's wife why appellant was being questioned. They explained to her the charge they were placing against him (Tr. 75). They asked her if she wished to talk to him and, when she replied that she did, permitted appellant and his wife to talk together alone for approximately five minutes from 5:35 A.M. to 5:40 A.M. (Tr. 75–76, 86–87, 146–147). As soon as he finished consulting with his wife, appellant came back and said that he would tell what happened (Tr. 76). His oral statement to the effect that he killed a

man during a fight was made at 5:45 A.M. (Tr. 76–77, 87, 89). He agreed to give a typewritten statement, the transcription of which began at 5:55 A.M. and finished at 6:32 A.M. (Tr. 77).

Appellant was advised of his constitutional rights regarding the making of a statement immediately after his conversation with his wife and after he made his brief oral confession (Tr. 77–78). The officers specifically mentioned his right not to make any statement and the possibility that any statement he might make would be used against him (Tr. 79). Detective Boyd could not remember anyone advising appellant of his right to retain an attorney (Tr. 92). Appellant did not request the presence of an attorney (Tr. 92). Detective Boyd did not threaten appellant and did not hear any threats made to appellant in his presence (Tr. 79).

George Alston took the stand and claimed that, during the course of his interrogation at the Homicide Squad Office, he was hit with a telephone book, stomped, kicked, and beaten (Tr. 117). Detectives Boyd and Banta denied that George was beaten or mistreated in any way (Tr. 83, 144–45, 157–158). Another witness, Lorenzo Harrison, testified that he had heard a brief scuffle with moving chairs when George was being questioned (Tr. 168).

Appellant himself took the stand for the limited purpose of the hearing to suppress. His version of the arrest and subsequent events differed from Detective Boyd's with respect to the time he arrived at Headquarters (5:15 A.M., Tr. 138), his answer to the initial police question as to what happened (he didn't know who killed Scott, although he was present at the time, since he had never seen the murderer before, Tr. 138), and his contact with his wife (he never spoke to her, Tr. 139, 141). Appellant claimed that the police refused to accept his disclaimer of knowledge of the identity of the killer and that a big police officer threatened to get the truth out of him the "hard way" (Tr. 138). Detective Banta denied this (Tr. 161). Appellant further contended that he made his statement because he was afraid of being beaten, afraid that what his brother George had told him had happened to George might happen to him (Tr. 135, 138, 140).

The trial court decided to accept the testimony of the police where it conflicted with that of appellant and his brother George and found that no threats had been made to appellant and that George had not been beaten (Tr. 170–171). Appellant's statement was held to be voluntary even if George had in fact been beaten. The trial court also ruled that the statement was not taken in violation of the *Mallory* Rule (Tr. 172).

Appellant's statement was admitted into evidence. In pertinent part it was as follows (Tr. 179–180):

> Well, we left 619 L Street, Northeast, George, my brother, and Chop-Chop. That is William Scott. And Chop-Chop said I owed him a dollar, and I told him I don't know that I owe you a dollar, I don't owe you a dollar. And we started arguing, me and him. We got in an argument and Chop-Chop hit me with his fist on my right chest and then he hit me with a stick, a board or something, and he hit me on the back of my right shoulder with that, and hit my brother on the knee with the board. Then Chop-Chop swung at my head with that board or stick or whatever it was and I ducked and I cut him.

Appellant in his confession admitted that he told two bystanders, Lorenzo Harrison and Billy Ray Harrison, that he cut Chop-Chop and that he wiped off the big blade of his pocket knife that he used to cut deceased (Tr. 182–183, 203), the same knife the police recovered from him and introduced in evidence (Tr. 212–213).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2403, provides as follows:

> Whoever with malice aforethought, except as provided in sections 22–2401, 22–2402, kills another, is guilty of murder in the second degree.

SUMMARY OF ARGUMENT

I

Appellant's oral statement was an admissible threshold confession obtained within fifteen minutes of his arrival at Police

Headquarters after appellant had consulted privately with his wife. This oral statement was immediately reduced to an admissible typewritten confession.

II

The trial court did not apply an incorrect constitutional standard in finding appellant's confessions voluntary since it specifically determined that the confession was not extracted by any threats or violence and no other proximate cause of appellant's avowing his responsibility for the killing was suggested.

III

Appellant's confession is not inadmissible under the Sixth Amendment since omission to inform him that he had a right to secure counsel is not tantamount to denial of his right to the assistance of counsel when he was advised of his right to remain silent and cautioned that any statement he made could be used against him and when he had neither requested nor been denied any opportunity to consult with his lawyer.

IV

There was sufficient corroboration of appellant's confession to permit the jury to rely upon it in finding him guilty of manslaughter because substantial evidence independent of the confession tended to establish the corpus delicti of the crime.

V

The confession by appellant that he cut and killed deceased with his knife was sufficient to support his conviction for manslaughter even though coupled with the exculpatory claim of self-defense since, given the evidence of an eyewitness account of the encounter between appellant and deceased and of the extent of the injury inflicted upon deceased, the jury was entitled either to accept that part of the confession which made appellant responsible for the killing and reject that part which raised the issue of self-defense or to accept the confession intact and, nonetheless, find appellant's forceful resort to his knife excessive under the circumstances.

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ARGUMENT

I. The confessions were not secured in violation of the *Mallory* Rule

(See Tr. 68–89, 137–142, 146–147, 170–172)

Appellant contends that his confessions should not have been received into evidence because they were obtained from him during a period of unnecessary delay within the meaning of Rule 5(a), F.R. Crim. P. as construed in *Mallory* v. *United States,* 354 U.S. 449 (1957). The trial court, resolving the contradictions in testimony at the admissibility hearing in favor of the Government, ruled that both the oral and written statements by appellant admitting that he killed the deceased were admissible because there was no unnecessary delay in reducing the threshold oral confession to writing (Tr. 71–72, 172).

Appellant was arrested at his brother's home, 18 Eye Street, Northwest at approximately 5:15 A.M. on February 21, 1964 (Tr. 71) and transported along with his wife to the offices of the Homicide Squad in Police Headquarters where he arrived at 5:30 A.M. (Tr. 68, 74, 75). The police, whose only evidence of appellant's involvement in the slaying of William T. Scott was a statement obtained from appellant's brother, talked "very briefly" to appellant for five minutes "at most" about his knowledge of the homicide (Tr. 75, 87). Appellant claimed to know nothing about it. The police ceased talking to appellant and informed his anxious wife of the event for which they were holding him responsible (Tr. 75). The police, acting upon her wish to talk to him, permitted appellant to speak privately with his wife over five minutes in the area around the corner of the L-shaped room in which appellant was being detained (Tr. 75–76, 85–87, 146–147). This family conference occurred between approximately 5:35 and 5:40 A.M. (Tr. 76). Immediately after appellant finished conferring with his wife, he returned directly to the officers and blurted out that he had killed the man in a fight (Tr. 76–77, 87, 89). After volunteering to tell the officers what happened, appellant further agreed to give a typewritten statement, the transcription of which started at 5:55 A.M. and concluded at 6:32 A.M. (Tr. 77, 87).

Appellant was arraigned when the Court of General Sessions convened for the day at 10:03 A.M. (agreed stipulation).

The oral statement which appellant spontaneously made after discussing the situation in private with his wife within fifteen minutes of his arrival at the Homicide Squad offices and thirty minutes of his arrest was admissible as a "threshold" confession as that concept, suggested in *United States* v. *Mitchell*, 322 U.S. 65 (1944), has been defined by this Court. See, *e.g.*, *Perry* v. *United States*, No. 18241, decided November 5, 1964 (oral statement made within twenty to thirty minutes of arrest since no sustained interrogation, although defendant was shuttled to-and-fro precinct and scene of crime and twice refused to answer any questions); *Coor* v. *United States*, No. 18493, decided October 1, 1964 (oral statement made within thirty-five minutes of arrival at Headquarters and after some police questioning); *Oliver* v. *United States*, —— U.S. App. D.C. ——, 335 F. 2d 724 (1964) (oral confession immediately upon arrival at precinct after advice as to rights despite subsequent repudiation); *Ramey* v. *United States*, —— U.S. App. D.C. ——, 336 F. 2d 743, *cert. denied*, 85 S. Ct. 79 (1964) (oral statement within a few minutes of arrest promptly given in response to routine inquiries as to what had happened); *Proctor* v. *United States*, No. 18187, decided June 25, 1964 (oral statement made after confronting defendant with evidence at precinct); *Gardiner* v. *United States*, 116 U.S. App. D.C. 270, 323 F. 2d 275 (1963), *cert. denied*, 375 U.S. 976 (1964) (oral confession within minutes after arrival at Federal Bureau of Narcotics while line-up sheet being prepared); *Jackson* v. *United States*, 114 U.S. App. D.C. 181, 313 F. 2d 572 (1962) (oral confession made within forty-five minutes of arrest); *Muschette* v. *United States*, 116 U.S. App. D.C. 239, 322 F. 2d 989 (1963), *vacated and remanded on other grounds*, 378 U.S. 569 (1964) (oral confession given within twenty-five minutes of arrest and ten minutes of arrival at Headquarters); *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958), *cert. denied*, 359 U.S. 959 (1959) (oral confession within forty-five minutes after arrival at Headquarters, including at least twenty minutes of questioning to determine what defendant knew of the crime). See also *Coleman* v. *United*

States, 115 U.S. App. D.C. 191, 317 F. 2d 891 (1963) (oral confession after initial denial and questioning within forty minutes of arrival at precinct admissible; evidence acquired afterwards by protracted questioning about related crimes excluded); *Naples* v. *United States,* 113 U.S. App. D.C. 281, 307 F. 2d 618 (1962) (*en banc*—oral confession within fifteen minutes after arrest admissible; evidence acquired afterwards by detour to scene for re-enactment excluded); *Jones* v. *United States,* 113 U.S. App. D.C. 256, 307 F. 2d 397 (1962) (oral confession after one hour of questioning admissible; evidence acquired afterwards by detour to scene excluded).

Appellant here was neither grilled nor subjected to protracted questioning. The officers who arrested him without a warrant on the sole basis of statements by his brother merely asked him what he knew about Scott's death to which he replied that he knew nothing or that he could not identify the murderer whom he saw commit the act since he had never seen the man before (Compare Tr. 75 with 138). This very brief inquiry of under five minutes in duration was in strict compliance with the boundaries of permissible, indeed, preferred, police conduct under *Heideman* v. *United States, supra.* The few minutes that elapsed from this initial routine inquiry to appellant's volunteering his statement were consumed not by police questioning or any police process lending itself to eliciting damaging admissions, but by appellant's private consultations with his wife, who requested this favor of the police. The decision by appellant to make a clean breast of the matter is attributable to the conclusions he and his wife arrived at in private, not to police questioning or delay.

In *Greenwell* v. *United States,* —— U.S. App. D.C. ——, 336 F. 2d 962 (1964), unlike the present case, the police who were armed with a warrant that foreclosed any need for further inquiry of defendant firmly to establish the propriety of charging him, unnecessarily delayed the initiation of the orderly administrative process designed to prepare defendant for presentment before a magistrate by taking defendant, in the absence of his wife, for a ride and parking for an informal interrogation in a police vehicle instead of bringing defendant directly to a police station for booking. The officers in *Greenwell* fur-

ther prolonged their detour to use defendant to help them locate the proceeds of the crime. In *Spriggs* v. *United States*, —— U.S. App. D.C. ——, 335 F. 2d 283, (1964), again unlike this case, the exact period during which defendant was questioned prior to confessing was in serious doubt because of the lack of any factual determination by the trial court (defendant claimed seven hours elapsed from arrest to statement; the police testified to only a half-hour). The defendant in *Spriggs* was catechized without any friend or relative present and was persistently badgered despite two specific refusals to tell the officer anything. Spriggs repudiated the confession introduced by the government, unlike appellant here, who never reneged what he said despite full opportunity to do so. The officer who was aggravated by Spriggs' refusal to talk knew he had an air-tight case against Spriggs at the time he questioned Spriggs, based on interviews with the victim and a disinterested eyeball witness, whereas the officers here only had the word of appellant's brother to go on. The present case in no way resembles *Ricks* v. *United States*, —— U.S. App. D.C. ——, 336 F. 2d 964 (1964), where defendant steadfastly maintained his innocence for two straight hours of questioning after his arrest.

The written statement which the police began typing immediately after hearing the oral confession at 5:55 A.M. and finished at 6:32 A.M., some forty-seven minutes after appellant admitted his role in the killing (Tr. 77), is admissible as a prompt reduction to writing of the oral confession. See, *e.g.*, *Proctor* v. *United States*, *supra* (oral statement reduced to writing within fifty-five minutes); *Bailey* v. *United States*, 117 U.S. App. D.C. 241, 328 F. 2d 542 (1964), *cert. denied*, 377 U.S. 972) (typed statement prepared and signed within seventy minutes of threshold confession); *Muschette* v. *United States*, *supra* (oral confession reduced to writing within fifty-five minutes); *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957) (oral confession reduced to writing within an hour). *Jones and Short* v. *United States*, (Nos. 17688, 17689, 17690, 17691, 17692, decided July 16, 1964, *en banc*) offers no obstacle to introduction of the written confession in this case since the typing there was delayed for two hours of further interrogation.

That appellant was not brought before a committing magis-

trate until three and a half hours after he had signed his written confession does not retroactively affect the otherwise admissible typewritten statement given during a brief delay not condemnable under the Mallory Rule and render it excludable. *United States* v. *Mitchell, supra; Bailey* v. *United States, supra.*

II. The proper voluntariness test was applied

(Tr. 79, 83, 93–94, 97–98, 135, 138, 140, 144, 157–158, 170–171, 177, 213)

"[W]herever a question arises whether a confession is incompetent because not voluntary," the court appraising the confession in light of the Fifth Amendment must find that the confession is "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence * * *" *Bram* v. *United States,* 168 U.S. 532, 542–543 (1897) reiterated in *Malloy* v. *Hogan,* 378 U.S. 1, 7 (1964) (applying this federal standard to the states).

The trial court adhered to this standard without deviation. Nowhere did appellant suggest that promises or improper influence of any kind prompted him to admit his guilt. His only basis for arguing that his confession was involuntary was the theory that police-inspired fear induced him to betray himself. He alleged when he took the stand during the hearing on voluntariness that he made his statement because he was afraid of what might happen to him physically in light of a "big" policeman's warning that, if he kept feigning ignorance of who killed deceased in spite of his admitted presence at the scene of the crime, "they" would get it out of him "the hard way" and of what his brother, George Alston, had earlier reported to him about his treatment at the hands of the police (Tr. 135, 138, 140). The police officers who testified denied making or hearing any threats made to appellant or physically abusing him (Tr. 79, 177, 213). The police also disputed the contention that George Alston had been beaten or threatened (Tr. 83, 144, 157–158). The court below weighed appellant's credibility against the credibility of the police officers and found it want-

ing (Tr. 170–171). It determined that appellant had not been offered bodily harm and that George had not been stomped and telephone book-battered. The court noted that, even if George's charges were truthful, it would not follow that appellant's confession was involuntary. Appellant's reliance on *United States ex. rel. Corbo* v. *LaVallee*, 270 F. 2d 513 (2d Cir. 1959), *cert. denied*, 361 U.S. 950 (1960) in no way undermines this alternative holding below, since, in *LaVallee*, defendant had himself been personally subjected to force when first taken into custody, knew from his own oral and visual observations rather than from questionable hearsay that a person interrogated in connection with the same offense prior to his confession had been physically punished by the police for not telling them what they wanted to hear, and had already undergone thirteen hours of questioning before the added straw of third party-derived fear broke his will.

The trial court thus properly decided that appellant's confession had not been wrung out of him against his will by police tactics smacking of coercion after scrutinizing the evidence adduced at the hearing and applying the Supreme Court-endorsed test of voluntariness. Appellant, nonetheless, contends that, despite its full consideration of the claims of threats and fear, the court adopted an erroneous constitutional standard by failing specifically to refer to and realize the full significance of appellant's educational level, place of origin, and prior contacts with the criminal law. By singling out these circumstances relating to the past of defendant and demanding that they receive express attention in every case in which involuntariness is asserted, appellant exposes his misunderstanding of the decisional process that underlies all of the confession cases. The Supreme Court has never proceeded by tossing all the possibly relevant ingredients of police conduct and defendant's personal characteristics into the pot, stirring them about in an undifferentiated stew, and ladling out the resulting mixture. Rather the Court, before it attempts to make its "fine judgment as to the effect of psychologically coercive pressures and inducements on the mind and will of the accused," *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963), always initially determines that such pressures and inducements in fact existed. Calculating the melting point

of the accused is meaningless unless some fire has been applied to him. In the absence of any credible evidence of police action causing appellant to confess or of an atmosphere or substantial coercion or inducement, the objective facts of appellant's life were properly treated as inconsequential.[1]

The record provides no basis for appellant's conclusion that the trial court did not consider the circumstances that the police did not advise appellant of his right to secure counsel prior to either confession in rendering its decision upon voluntariness.[2] Failure to mention in making a ruling is not synonymous with failure to take into account. A trial judge may have to be explicit when he instructs a jury, see *Haynes* v. *Washington*, *supra* (critical of judge's failure to instruct on the relevancy of lack of warning of constitutional rights to assessing voluntariness), but he does not have to analyze out loud every factor that is a component of his resolution of a legal issue upon penalty of being required to review the issue de novo.

III. There was no denial of right to counsel

(Tr. 77–79, 91–92)

Appellant claims that his confession should have been excluded because he was unrepresented by counsel at the time he

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[1] The record does not disclose judicial refusal to admit the proffered background evidence. It merely reveals that the trial court declined to place much emphasis on appellant's eighth grade education and North Carolina origin (Tr. 93, 94). In excluding evidence about appellant's non-existent criminal record, the court indicated not that the thrust of such evidence was immaterial, but that testimony from appellant himself would provide the best evidence of his lack of sophistication when confronted by the criminal law, testimony appellant was free to give in the admissibility hearing without jeopardizing his self-incrimination privilege (Tr. 97–98).

[2] It is, at least, arguable whether police failure to advise a defendant of his constitutional rights to remain silent and hire a lawyer are probative on the issue of voluntariness under the Fifth Amendment where there is no acceptable evidence of coercive atmosphere engendered by improper police tactics. The lack of such warning does not per se constitute proof of involuntariness. *Wilson* v. *United States*, 162 U.S. 613, 623 (1896). It is only an "attendant" circumstance, significant when accompanying other circumstances in the interrogation environment redolent of coercion. See *Haynes* v. *Washington*, *supra*, 373 U.S. 503 at 517 (sixteen hours of incommunicado detention coupled with the inducement of being able to communicate with wife and lawyer upon confessing).

confessed and ignorant of his right to retain counsel. Since the decision in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) this court has twice rejected the view that a voluntary confession given at a time when the accused is unrepresented by counsel is per se inadmissible under the Sixth Amendment. *Long* v. *United States,* No. 18368, decided October 22, 1964; *Jackson* v. *United States,* No. 17746, decided August 13, 1964. The issue then is whether the additional circumstance of the failure of the police to advise appellant of his right to obtain an attorney is enough to transform what would otherwise be a unobjectionable confession into one obtained in violation of the Sixth Amendment, particularly where appellant has been fully informed of his other rights with regard to making statements.

No Federal case to date has held that a defendant who is ignorant of his right to secure counsel but is fully cognizant of his right to remain silent and of the possibility that anything he says might be used against him and is, therefore, aware of precisely the rights with which it is the essential function of counsel to acquaint him, may confess with impunity. The Supreme Court in *Escobedo* v. *Illinois, supra,* in setting forth the rule of the case and distinguishing it from *Crooker* v. *California,* 357 U.S. 433 (1958) heavily underlined the critical significance of the particular circumstances involving an unrepresented accused who had repeatedly requested and been denied an opportunity to consult with his lawyer and who had not been effectively warned, indeed, not warned at all, of his absolute constitutional right to remain silent. 378 U.S. 478 at 491–492. Those circumstances do not obtain here. Appellant after consulting with his wife and within twenty-five minutes of being brought into headquarters and forty minutes of being taken into custody volunteered to make a statement. Compare *Escobedo* v. *Illinois, supra* (pre-confession detention of at least five hours), *Crooker* v. *California, supra* (pre-confession detention of fourteen hours), and *Jackson* v. *United States, supra* (pre-confession detention of ten hours). Appellant had been advised he need make no statement and cautioned of the dangers if he did (Tr. 77–79, 91–92). Appellant never asked for nor was denied an opportunity to consult with his lawyer (Tr. 92). Under these circumstances and in a situation vitally

different from that in *Escobedo,* reversal on the authority of *Escobedo* would involve the promulgation of a rule broader than that which the Supreme Court itself has yet proposed.

IV. The corroboration of the confession was sufficient
(Tr. 30–31, 56, 59)

Appellant contends that the charge of second degree murder and, hence, the offense of manslaughter which it encompassed should have been dismissed by the trial court because there was insufficient corroboration of his written confession that he killed W. T. Scott since no government witness was able to identify or accurately describe him as the killer.

In espousing the proposition that the Government in a murder case cannot utilize a confession unless it produces other evidence linking the confessor with the slaying, appellant blithely ignores the nature and application of the corroboration requirement. The rule that where the prosecution seeks to rely on a confession that confession must be corroborated by extrinsic evidence originated in connection with homicides in which the courts were understandably loath to convict confessing defendants in the absence of proof that the alleged deceased was indeed dead of foul play. See generally 7 Wigmore, Evidence (3rd ed. 1940) §§ 2070–2072. Accordingly, when a charge of homicide was at stake, English and American judges required proof of the corpus delicti before permitting the jury to use the confession in reaching its verdict. This term of art was construed to include not only the harm done (i.e. that the alleged deceased was dead) but also the criminal origin of that harm (i.e. that the death was caused by the violence of another, not by suicide or accident). The corpus delicti in homicide did not comprehend the identity of the guilty criminal agent. *Smith* v. *United States,* 348 U.S. 147, 153–154 (1954) (the crime of homicide can be shown without identifying the accused); *Murray* v. *United States,* 53 App. D.C. 119, 124, 127 288 Fed. 1008, 1013, 1016 (1923) (the probability that defendant committed the crime is no part of the corpus delicti); *People* v. *Cuozzo,* 292 N.Y. 85, 54 N.E. 2d 20 (1944) (statutory corroboration rule); *Commonwealth* v. *Webster,* 59 Mass. (5 Cush.) 295 (1850). It was only when this doctrine applicable

to homicide was extended to other crimes where the nature of the corpus delicti was more elusive and necessarily included reference to the particular defendant as criminal agent through some such component as scienter or intent that serious issues as to the quantum of corroboration required arose. See, *e.g. Opper* v. *United States*, 348 U.S. 84 (1954) (corpus delicti is payment of money plus rendering of services by government employee); *Smith* v. *United States*, *supra* (corpus delicti of willful understatement of income tax requires showing of who accused is); *Naples* v. *United States*, No. 18186, decided November 9, 1964 (subjective intent to steal); *Smoot* v. *United States*, 114 U.S. App. D.C. 154, 312 F. 2d 881 (1962) (must identify defendant to show crime of knowingly aiding and abetting interstate transportation of stolen vehicle); *Bray* v. *United States*, 113 U.S. App. D.C. 136, 306 F. 2d 743 (1962) (knowingly transporting stolen motor vehicle in interstate commerce); *Ercoli* v. *United States*, 76 U.S. App. D.C. 360, 131 F. 2d 354 (1942) (corpus delicti of negligent homicide includes operation of motor vehicle in one of four ways); *Forte v. United States*, 68 App. D.C. 111, 94 F. 2d 236 (1937) (knowledge or scienter as necessary component of corpus delicti under the National Motor Vehicle Theft Act). The *Smith* and *Opper* corroboration standard of independent evidence tending to establish the trustworthiness of defendant's statement was evolved in relation to those crimes unlike homicide in which the corpus delicti was not an insolable tangible, but rather involved subjective facts. See in addition to cases cited *supra*, *Manning* v. *United States*, 215 F. 2d 945 (10th Cir. 1954). As the Supreme Court in *Smith* v. *United States*, *supra*, realized, the accused in cases involving intangible corpus delicti may get broader protection with respect to the use of his confession against him than the person accused of homicide, but that differentiations is the law of the land and is a natural consequence of the evolution of the corroboration requirement.

In this case, therefore, the extrinsic proof that William T. Scott died as the result of a stab wound in the neck which severed his jugular vein and carotid artery (Tr. 59) and that Martha Price saw a man subsequently identified as the deceased hit in the neck by another outside of 1036—6th Street, N.E.

and further saw the man fall to the ground at a point where he was discovered dead (Tr. 30–31, 56) satisfied the requirement of corroboration in homicide cases endorsed by this Court in *Murray* v. *United States, supra,* and the Supreme Court in *Smith* v. *United States, supra* by supplying proof aliunde of Scott's death at the hands of another person.

V. The confession in conjunction with other evidence was sufficient to support the conviction

(See Tr. 30–31, 179–180)

Appellant claims that the evidence was insufficient to support his conviction because only the confession linked him to the slaying and, in the absence of any evidence contradicting the statements contained in the confession, the jury could not refuse to believe those portions of the confession which would relieve appellant of guilt. The jury may judge for themselves the truth of any part of a confession, accepting some and rejecting the balance, believing damaging admissions and discrediting exculpatory assertions. *United States* v. *Prior,* 5 D.C. (5 Cranch) 37, Fed. Case. No. 16092 (1837); *United States* v. *Wilson,* 178 F. Supp. 881 (D.D.C. 1959). The jury may pick and choose what portions of the confession to believe in light of all the other evidence which bears on the facts related in the confession. A confession in this respect is no different from any other item of evidence, be it direct testimony or hearsay admissible by virtue of an exception to the rule.

To accept appellant's argument is to reach the incredible conclusion that the jury must be arbitrarily confined to swallowing a defendant's story whole as long as the defendant does not take the stand. There is no rule of law or reason for allowing the Delphic Oracle to assure that its revelations must be accepted as one hundred percent accurate by becoming a Laconian. Appellant's silence at trial does not render his earlier statements unimpeachable verities.

In this case, Martha Price's testimony that the man who was hit, i.e. the deceased, himself did no hitting and had nothing in his hands (Tr. 30–31) provided a more than sufficient basis for the jury to discredit appellant's claim that Chop-Chop hit him twice, once with his fist and once with a "something,"

and swung at him unsuccessfully with a "whatever it was" before appellant let loose with his knife (Tr. 179–180). There is a sizable difference between jumping from disbelief of defendant's denial in *United States* v. *Wilson, supra,* of any intent to kill or premeditation to an affirmative finding that such intent and premeditation existed in sufficient quantity to uphold a verdict of first degree murder and crossing the gap between disbelief of appellant's allegations on self-defense and an affirmative finding that appellant was not attacked or hit by deceased via the catwalk of independent testimony that the deceased did not hit appellant and used no weapon against appellant.

Alternatively, the jury might have accepted appellant's statement on its face, believing his every word. Appellant's acquittal would not have to follow as an automatic consequence, for, while the use of some force in self-defense may have been necessary for appellant to avoid contusions, nowhere in his statement does appellant even remotely hint that he believed himself to be in jeopardy of imminent death or great bodily harm at the hands of the deceased swinging his fists and an unknown object resembling a stick. The jury was entitled to determine that appellant acted unreasonably in light of the circumstances set forth by him in inflicting upon deceased a stab wound of such deep penetration as to sever both the jugular vein and the carotid artery.

Neither of these methods of handling appellant's confession would have been improper. Either would provide a predicate for an unreversible verdict of manslaughter.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 18,750

TOM E. ALSTON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Forma Pauperis Appeal from a Judgment of the

United States District Court for the District of Columbia

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REPLY TO APPELLEE'S POINT III

Appellant has argued that his confessions should have been excluded because they were taken from him after police questioning had begun and before he was warned that he need not make any statements without the assistance of counsel. The Government has cited this Court's decisions in Long v. United States,

No. 18368 (October 22, 1964) (slip opinion), and Jackson v. United States, No. 17746 (August 13, 1964) (slip opinion), in which this Court has rejected the argument that a confession given by an accused who is unrepresented by counsel is inadmissible, regardless of the circumstances. It states that the issue, therefore, is whether the failure of the police to advise appellant of his right to obtain an attorney is sufficient to transform what would otherwise be an unobjectionable confession into a confession obtained in violation of the Sixth Amendment, "particularly where appellant has been fully informed of his other rights with regard to making statements." [Br. 13]

Appellant was not, however, fully informed of his other rights at the time he made his oral statement. As the Government recognizes in its Counterstatement of the Case [Br. 3], appellant was advised of his right to remain silent and that anything he said may be used against him only after he had made an oral confession [Tr. 75-78, 175]. This oral confession was made after the police had an opportunity to advise appellant of his rights [Tr. 75]. This is not a case where appellant

blurted out a confession before police had such an opportunity. See Long v. United States, No. 18368 (October 22, 1964) (slip opinion).

The Government's argument relates only to appellant's written confession. But both confessions were objectionable. With regard to both confessions, appellant was not advised of his right to the assistance of counsel. The absence of advice about appellant's right to counsel was in no way mitigated by police advice about other rights prior to the oral confession. With respect to the written confession, it was clearly the product of the earlier oral confession and inadmissible on that ground alone. Killough v. United States, 114 U. S. App. D. C. 305, 315 F. 2d 241 (1962) (en banc). Even if it were not the product of an earlier illegal confession, however, the written confession is nevertheless objectionable since appellant was not advised of his right to counsel prior to signing it. The Government argues that the absence of counsel was not crucial since, as a result of the police warning appellant about his right to remain silent and that anything he said could be used against him, he was aware of the rights of which he would be informed by counsel. Leaving aside the question

of whether advice by the police can ever replace either impartial judicial advice or advice by an accused's own attorney, counsel has a responsibility to do more than warn his client about the extent of his rights. He must also advise his client about whether, when, and how to exercise these rights. A police warning is therefore no substitute for the advice of counsel.

The Government also argues that it is significant that appellant here, unlike the petitioner in Escobedo, did not ask specifically for the opportunity to consult with counsel. Appellant has dealt with this point in his brief, but he would like to call to the attention of the Court two recent cases in which the courts have held that the application of the principles of the Escobedo case cannot depend on whether the accused requested counsel. The Supreme Court of California, in People v. Dorado, _____ Cal. _____, 394 P. 2d 952 (1964), and the United States Court for the District of Puerto Rico, in Garlaza Cruz v. Delgado, 233 F. Supp. 944 (1964) (Dist. Ct. Puerto Rico), have both recognized that a distinction based upon whether an accused has requested counsel is untenable.

REPLY TO APPELLEE'S POINT IV

Appellant has argued that his conviction must be reversed because there was insufficient corroboration for appellant's confession. The Government has made a formalistic argument that in a case where the corpus delicti is not "an isolable tangible," only the harm done and the criminal origin of that harm need be shown in order to corroborate a confession.

Appellant believes that the argument by the Government indicates a fundamental misunderstanding of the decisions of both this Court and the Supreme Court on the corroboration that is required for a confession. It is true that in 1923 this Court, in Murray v. United States, 53 U. S. App. D. C. 119, 288 Fed. 1008 (1923), held that the probability that the defendant committed the crime constituted no part of the corpus delicti in a homicide case and required a showing limited to proof of corpus delicti to corroborate a confession. Subsequently, this Court applied a rule requiring a search for independent proof of all aspects of the corpus delicti, even in instances when the corpus delicti required

proof of scienter or intent, which could not be shown without also introducing evidence that would link the accused to the crime. Thus, in Forte v. United States, 68 U. S. App. D. C. 111, 94 F. 2d 236 (1937), aff'd on other grounds 302 U. S. 220 (1937), this Court held that since the Government had failed to prove guilty knowledge in a prosecution for knowingly transporting a stolen motor vehicle in interstate commerce, it had not sufficiently corroborated a confession. Subsequently, in Smith v. United States, 348 U. S. 147 (1954) and Opper v. United States, 348 U. S. 84 (1954), the Supreme Court ruled on the corroboration necessary for admissions in cases where proof of corpus delicti also identified the criminal agent. It chose a less rigid rule on corroboration than that which had been previously applied by this Court. The Smith and Opper cases represent a recognition by the Supreme Court that a rule on corroboration of confessions depending upon the formalistic concepts of corpus delicti is not appropriate. These cases were decided in the context of prosecutions for crimes not having a tangible corpus delicti. Nevertheless, the focus of the Court shifted from proof of corpus delicti to evidence tending to establish the trustworthiness of the confession. This Court has subsequently applied the test of

trustworthiness rather than seeking specifically for proof of corpus delicti. See, e.g., Smoot v. United States, 114 U. S. App. D. C. 154, 312 F. 2d 881 (1962). The trustworthiness test should be applicable to confessions of crimes involving a tangible corpus delicti as well as those in which the corpus delicti is intangible.

The Government has stated that the rule that a confession must be corroborated by extrinsic evidence originated in cases involving homicides, where the courts required evidence that the deceased died as a result of foul play in order to convict [Br. 14]. It is implicit in the Government's argument that this remains the sole justification for requiring corroboration for confessions in homicide cases. However, as this Court has recently stated in Naples v. United States, No. 18186 (Nov. 9, 1964) (slip opinion) at p. 10:

> "Minimal corroboration of confessions may be sufficient to avoid the dangers of conviction based on false confessions induced by some inner compulsion. [Citations omitted] But it may not always be sufficient to preserve the integrity of our system of criminal justice. As the Supreme Court has recently emphasized, 'We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession'

> will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.' Escobedo v. United States, 378 U. S. 478, 488-89 (1964). Thus, sufficient extrinsic evidence should be required to preserve the integrity of the right against self incrimination, the presumption that every accused is innocent until his guilt is established beyond a reasonable doubt and the accusatorial nature of our system."

Although in some cases proof of corpus delicti may be all that is necessary in order to corroborate a confession, where this proof may be sufficient to establish the trustworthiness of the confession, that was not the case here. Nor is it necessary in all cases to introduce evidence linking the accused with the crime in order to demonstrate the trustworthiness of the confession. But, where in the course of presenting its own case, the Government's witnesses have given testimony indicating that the accused has not committed the crime, and there has been no contrary testimony that would link the accused with

the crime or in some other way rebut the testimony, even though the corpus delicti may have been established, the confession has nevertheless not been shown to be trustworthy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Reply Brief for Appellant was mailed to David C. Acheson, Esquire, United States Attorney for the District of Columbia, United States Court House, Washington, D. C. on this 10th day of December, 1964.

George H. Shapiro